IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 80....

CONCERNED PARENTS & CITIZENS FOR THE CONTINUING EDUCATION AT MALCOLM X (PS 79), et al.,

Petitioners,

-against-

THE NEW YORK CITY BOARD OF EDUCATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ALLEN G. SCHWARTZ,
Corporation Counsel of
the City of New York,
Attorney for Respondents,
100 Church Street,
New York, N. Y. 10007
(212) 566-2183

LEONARD KOERNER,
JUDITH A. LEVITT,
MARION M. SCHUMAN,
CAROL ABRAMSON,
of Counsel.

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OCTOBER TERM, 1980

No. 80....

CONCERNED PARENTS & CITIZENS FOR THE CONTINUING EDUCATION AT MALCOLM X (PS 79); TONI FRANKS indiv. & as next friend of TONY FRANKS; GEORGIA KEY indiv. & as next friend of TYRONE KEY; INA WILLIAMS; indiv. & as next friend of DETRA WILLIAMS; EVA KILLING VARGAS indiv. & as next friend of EDRA VARGAS; LOUISE WATSON indiv. & as next friend of JOHN WATSON; MATTIE MITCHELL indiv. & as next friend of ANTHONY EDWARD MITCHELL; HELEN ROBERTS indiv. & as next friend of BERNADETTE ROBERTS,

Petitioners,

-against-

THE NEW YORK CITY BOARD OF EDUCATION; FRANK J. MACCHIAROLA indiv. & as Chancellor of the New York City Board of Education; JERRY C. CROSS indiv. & as Exec. Director of the Division of Special Education of the New York City Board of Education; THE BOARD OF TRUSTEES OF COMMUNITY SCHOOL DISTRICT # 5; WILLIAM ALLEN, SNOWDEN E. EICHELBERGER, LORRAINE C. HALE, JEAN A. HIGGINS, BARGARA C. JOHNSON, and THEODORE MEEKINS indiv. & as members of the Board of Trustees of Community School District # 5,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

Question Presented

Whether the Circuit Court was correct when it determined that the Education for All Handicapped Children Act does not require prior notice and a hearing when handicapped children in special classes in one school are transferred to substantially similar classes at other schools within the same school district and that such a transfer does not constitute a "change" in "educational placement" as defined in the Act.

Preliminary Statement

Petitioners, approximately 200 handicapped students who attended P.S. 79 in the 1978-79 school year, and their

parents, commenced this action challenging the closing of P.S. 79 and the transfer of these children to other special education classes within the school district. Petitioners contend that the transfer of the handicapped students without prior notice and a hearing violated the Education for All Handicapped Children Act.

After a trial on the application for a preliminary injunction, the District Court for the Southern District of New York, entered judgment in favor of petitioners and directed that the services and activities which the children had received at P.S. 79 be duplicated at each of the schools to which the children had been transferred. The Court of Appeals for the

Second Circuit reversed, holding that the transfer did not constitute a change in the "educational placement" of the children requiring prior notice and a hearing under the Act.

Statement of Facts

Petitioners are handicapped children and the parents of handicapped children who attended special education classes in Public School 79 in Community School District 5 in Manhattan, during the 1978-79 school year. After public hearings regarding the serious budgetary problems in District 5, P.S. 79 was closed in September 1979 and all students, including petitioners, were relocated to other schools within the same district.

P.S. 79 was unusual in the City of New York in that it was a regular public school that housed more classes for handicapped children than non-handicapped children (A. 254).* It had seven classes for non-handicapped students (A. 137-38, 331), and between 20 and 25 handicapped classes (A. 137, 252). The combined student population was somewhat over 300, and handicapped children outnumbered the non-handicapped by at least two-to-one (A. 176).

*Unless otherwise indicated, numbers in parentheses preceded by "A" refer to the appendix filed in the Court of Appeals; numbers preceded by "App." refer to pages in the appendices annexed to the petition for a writ of certiorari.

At P.S. 79, the plaintiff children were placed in several different types of special education classes in accordance with their individual needs, including classes for children with learning disabilities ("HC-30"), classes for children with retarded mental development and emotional problems ("EMR-EH"), classes for the emotionally handicapped ("CEH"), and classes for children with neurological impairment and emotional problems ("NIEH") (A. 249).

The placements of handicapped children, including plaintiff children, in the appropriate special education class are determined by the Committee on the Handicapped ("COH"). Based upon a multi-disci-

plinary evaluation of each child, the COH determines which type of instructional program would be best for each child (A. 246-248). Thereafter, the Administrative Unit of the Division of Special Education, not the COH, selects the site for the instructional programs on the basis of available classroom space and the appropriateness of such space for the particular program (A. 268-269). Thus, site selection is independent of the determination of the appropriate type of educational program to be provided to the student, except to the extent that the site must be appropriate to the type of program.

While attending P.S. 79, plaintiff children were provided with several special programs run by organizations other than the Board of Education over and above the regular curriculum and the supportive services of psychologists, social workers and speech therapists (A. 151, 155). The handicapped children interacted with non-handicapped at breakfast, lunch, assembly and, for some children, at after-lunch recess (A. 127-128). Extracurricular and enrichment activities included Girl Scout and Boy Scout programs (A. 155), a basketball team (A. 180), the Afro-American Caravan (A. 66), and a President's Physical Fitness program (A. 180-181). Many of these programs and services, available to

both handicapped and non-handicapped children, were unique to P.S. 79 and depended for their existence upon voluntary cooperation of the outside organizations, the special talents of the faculty at the school, and the size of the student population as well as the ratio of handicapped students (A. 151-155). Had P.S. 79 remained open during the 1979-80 school year, some of these services, none of which were elements of a child's educational program, would have been reduced because of budgetary constraints.

In September 1979, at the beginning of the school term, the special education classes, and therefore the plaintiff children, were relocated from P.S. 79 to

other public schools within District 5. The Manhattan Administrative Unit had sent letters on August 20, 1979 to the parents of the affected children informing them that, since P.S. 79 would not open in September, their children were being transferred to a different school (A. 47, 571).

The Division of Special Education relocated plaintiff children, after consultation with the District personnel, in available classrooms and preferably in schools which housed other special education classes. As far as possible, classes were kept intact - students and teachers were relocated together (A. 260).

Changes in staff did occur which made it impossible to keep some children with the same teacher. There is no reason to believe, however, that these changes in staff would not have occurred at the beginning of the school year had the children remained at P.S. 79.

The move was planned with great care and plaintiff children are being provided with all the requisite supportive services and curricular activities as determined by the COH (A. 260, 283, 288, 309, 313-14, 316). They are being served by social workers, speech therapists and psychologists where necessary (A. 283, 288, 309, 313-14, 316). Special education classes within the same program identifica-

tion, i.e., EMR-EH, NIEH, etc., are basically identical to those conducted at P.S. 79, but with some differences caused by teacher style, class composition and support services (A. 265-266).*

At the new locations, plaintiff children may participate in all the extracurricular activities offered by the school but these activities may not be identical to, as diversified, or as numerous as those offered in 1978-79 at P.S. 79. At the time of the hearing, plaintiff children, at most of the schools to which they had been transferred, were participating with non-

*Plaintiffs, in fact, stipulated that plaintiff children are in the same education programs they were in at P.S. 79 (A. 251-52).

handicapped children in such activities as breakfast, lunch, assemblies and gym, and some were being academically mainstreamed (A. 287-308, 310-311, 316-317). Although at the time of the hearing the plaintiff children at P.S. 46 were only being mainstreamed in the breakfast program, they are now participating fully in breakfast, lunch and assemblies (A. 80-83).*

One admitted error was made in the relocation of the plaintiff children from P.S. 79. Approximately 15 older children were mistakenly transferred to

*Having moved from a small, tightly-controlled environment with predominantly handicapped students at P.S. 79, it was necessary to phase these children in slowly, especially those who are severely emotionally handicapped (A. 257).

P.S. 36, a school containing kindergarten through second grades (A. 261). The children had the same teacher and received the same instruction as at P.S. 79, but had little opportunity to interact with children their own age (A. 178-180, 182). This error was rectified in December 1979, when these children were transferred with their staff to P.S. 123, the school originally planned as the site for the children (A. 488).

Opinions Below

District Court Opinion and Order and Judgment

The District Court very thoroughly reviewed and described the program of activities available to handicapped

students at P.S. 79 during 1978-79 (App. 19a-21a). It then notes that these same activities were not in operation at the new location and that the handicapped children were not being mainstreamed at the new locations to the same degree as at P.S. 79 (App. 23a-24a).

The Court concluded that (App. 25a):

> What was done seems totally at variance with both the letter and spirit of the federal and state laws designed to provide procedural protection for the handicapped ... and support the development of educational practices which provide the handicapped with educational skills to help them develop their capabilities to the greatest extent possible.

The order and judgment entered thereon specifically held that the trans-

fer of petitioner children constituted a change in educational placement which was accomplished without following the prior notice and hearing requirements of the Education for All Handicapped Children Act (App. 29a). The judgment then lists the programs which must be duplicated at all the receiving schools (App. 31a-32a). This list includes choral groups, cheerleading squads, Boy and Girl Scout troops, and weekly radio broadcasts in conjunction with a local radio program.

Court of Appeals Opinion

The Court of Appeals reversed the order of the District Court and vacated the preliminary injunction.

The Court noted that the Act fails to define "change ...[in] educational placement." After reviewing the legislative history, the statutory scheme and regulations promulgated thereunder, the Court held that (App. 7a-8a):

> "educational placement" refers only to the general type of educational program in which the child is placed. So construed, the prior notice and hearing requirements of §1415(b) would not be triggered by a decision, such as that made by the Board in this case, to transfer the special education classes at one regular school to other regular schools in the same district.

In so holding, the Court rejected the District Court's construction of the term to include "the transfer of handi-

capped students between schools in the same district, as well as any other significant alteration in the curriculum, extra-curricular offerings, support services, class composition, or teacher assignments provided to handicapped children." (App. 7a).

In addition to citing the language of the statute and the regulations in support of its definition, the Court noted the policy reasons for rejecting the District Court's broad construction. In light of the hearing requirements under the Act and the right to obtain review of adverse decisions, the Court found that the broader interpretation of the Act (App. 12a):

> would virtually cripple the Board's ability to implement even minor discretionary changes within the educational programs provided for its students; that interpretation would also tend to discourage the Board from introducing new activities or programs or from accepting privately sponsored programs. Further, the educational agency would lack any workable standard for assessing whether a particular contemplated decision might constitute a change in "educational placement."

ARGUMENT

THE COURT OF APPEALS WAS CORRECT IN ITS DETERMINATION THAT THE RELOCATION OF THE SPECIAL EDUCATION CLASSES DID NOT CONSTITUTE A CHANGE IN THE EDUCATIONAL PLACEMENT OF PLAINTIFF CHILDREN.

The sole question raised in the instant petition is whether the Court of Appeals was correct in its definition of

the term "educational placement" used in §1415(b)(1)(c) of the Education for All Handicapped Children Act ("EHA"). That section provides, in part, that prior notice and an opportunity for a hearing be provided to all parents and guardians of handicapped children when the educational agency

> (i) proposes to initiate or change, or
>
> (ii) refuses to initiate or change, the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child....

In delineating the applicability of the prior notice provisions of the statute to the instant case, the Second

Circuit had to determine whether the transfer of handicapped children from P.S. 79 to other schools in the same district constituted a change in "educational placement." As the term is not defined in the statute, the Court of Appeals properly looked at the legislative intent, the statutory framework, the implementing regulations and case law to determine its meaning. The Court concluded that, as used in the statute, "educational placement" reasonably refers only to a change in

> ... the general type of educational program in which the child is placed.

App. 7a-8a.

The stated purpose of the EHA is (20 U.S.C. §1401):

> to assure that all handicapped children have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs. .

Of central concern to Congress were practices and procedures which might result in the misclassification of a handicapping condition and discriminatory treatment of children identified as handicapped. Specifically, it sought to ameliorate

> (1) the misuse of appropriate identification and classification data within the educational process itself; (2) discriminatory treatment as the result of the identification of a handicapping condi-

> tion; and (3) misuse of identification procedures or methods which results in erroneous classification of a child as having a handicapping condition. (emphasis added)

S. Rep. No. 94-168, 94 Cong., 1st Sess., at 26-27; U.S. Code Cong. & Admin. News, pp. 1450-51 (1975).

The legislative intent is reflected in the statutory structure which emphasizes the need for careful and responsible identification and classification of handicapped children. In determining the meaning of "change" in "educational placement", it is significant that the term appears in the same section of the statute which refers to changes in "identification"

and "evaluation" of the handicapped child. The Court of Appeals concluded that (App. 8a-9a):

> the reference to "educational placement" in §1415(b)(1)(c) would appear to refer to the general educational program in which a child who is correctly identified as handicapped is enrolled, rather than mere variations in the program itself...

As applied to the facts in this case, the Court of Appeals' definition of educational placement supports the conclusion that changes inherent in the beginning of a new school year in a new school are not the type of changes contemplated by the statute. Rather, as the Court made clear, entitlement to prior notice and a hearing is (App. 8a):

> ...limited to certain fundamental decisions regarding the existence and classification of a handicap, and the most appropriate type of educational program for assisting a child with such a handicap.

The regulations implementing the EHA lend further support to this interpretation of the statutory language. The regulations provide in part:

> (a) Each public agency shall insure that a continuum of alternate placements is available to meet the needs of handicapped children for special education and related services.
>
> (b) The continuum required under paragraph (a) of this section must:
>
> (1) Include the alternate placements listed in the definition of special education under §121a.13 of Subpart A (instruc-

> tion in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) ...(emphasis added).

45 CFR §121a.551.

As used in this context, "placement" refers to the type of educational program offered and not to the particular differences which might arise when that program is offered in one school or another. Seen from this perspective, the provision in §1415(b)(1)(c) must be interpreted to mean that the prior notice and hearing requirements apply only when the agency wishes to change those aspects of a child's education which are necessary

to meet a child's individualized educational needs.

Further, the New York State regulations, enacted in conformity with the requirements of the EHA,* specifically define "change in the disability/handicapping classification of a pupil, transfer to a different type of program, or the transfer to or from a school district." 8 N.Y.C.R.R. §200(q). New York Education Law §4401 defines "special services or program" as "special classes, part-time pro-

*A state is required to submit a Plan to the federal government in order to receive assistance under the EHA. If the state regulations do not conform to the requirements of the Act, the Plan would be disapproved.

grams, resource rooms, alternate learning centers, home instruction and special teachers..."

Petitioners attempt to argue that if the action of the respondents in the instant case does not constitute a change in "educational placement" then it is a change in "free appropriate education". However, while "educational placement" is not specifically defined in the statute, "free appropriate education" is clearly defined and has no applicability to the instant case.

"Free appropriate education" is defined as special education and related services provided at public expense and in conformity with the individualized

education program ("IEP") (20 U.S.C. §1401(18)). The statute more specifically defines the terms "special education" and "related services" (20 U.S.C. §1401):

> (16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.
>
> (17) The term "related services" means transportation, such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special

> education, and includes the early identification and assessment of handicapping conditions in children. (emphasis supplied)

As neither the special education nor the related services was changed for the individual students when P.S. 79 was closed, any variation between the old and new schools cannot be termed a change in the "free appropriate education". Most of the programs which were discontinued when P.S. 79 was closed were extra-curricular, offered equally to handicapped and non-handicapped children and therefore bear no relationship to the "specially designed instruction ... to meet the unique needs of a handicapped child ...."

Thus, the statutory purpose and language and the implementing regulations support the Court of Appeals concrete definition of those situations which trigger the prior notice requirements of the Act. Rather than the catch-all definition adopted by the District Court, these situations appear to include only a change in identification or evaluation of the handicapped child, a change in classification or instructional program (e.g., NIEH, EMR-EH), or change in setting of the instructional program (e.g., special class, special school).

With respect to all other matters, the Act provides that a parent

may always file a complaint and thereby initiate a due process hearing. Section 1415(b)(1)(e) requires educational agencies to provide parents and guardians with

> an opportunity to present complaints with respect to any matter relating to the identification, evaluation or educational placement of the child ... (emphasis added).

The creation of a bilateral hearing structure is further indicative of the Congressional intent to permit parents to fully participate in all aspects of their handicapped children's education while leaving questions of administration to the educational agency. Congress established a clear line between those situations touching on fundamental decisions and

those affecting "any [other] matter ..."; in the former, prior notice and opportunity for a hearing is mandated; in the latter, a parent having a complaint must initiate the hearing. There is no matter affecting a handicapped child's education in which a parent does not have an opportunity for a hearing. Where, as in the instant case, parents are dissatisfied with the differences in extra-curricular programs and in mainstreaming between the new and old schools, they have an opportunity to complain to the educational agency. It would, however, be contrary to the intent of the statute to provide prior notice of variations in the programs when the educational program has not been changed.

Case law interpreting both the federal statutes and implementing regulations supports the construction of the prior notice requirements suggested herein.

In Emmie Brown v. District of Columbia Board of Education 3 EHLR 551:101 (D.D.C. 1978), the District Court found that the regulations promulgated under the EHA appear to use the term "placement" as a substitute for "program" and that the due process mechanisms under the Act are available only for changes that affect the form of educational instruction being provided to a handicapped child. In applying the statute, the Court held that the relocation of a class for deaf-blind students from one school to another to provide addi-

tional supportive services, but not otherwise changing the educational instruction, was not a change of placement triggering the prior notice requirements of the EHA.* In so holding, the Court stated:

> To find otherwise could extend the notice and hearing requirements of the Act to situations perhaps not contemplated by Congress and impose a procedural mechanism that could severely limit the administrative discretion of local educational authorities. For example, if

*In Emmie Brown, the children attended a special class in a regular school and, although in a self-contained special education class, were to some degree integrated with non-handicapped children during recess, breakfast, lunch and assemblies. The children were then moved to a building housing only handicapped children, although remaining as a self-contained class. The move thus limited their opportunities for interacting with non-handicapped students.

> a change in placement were deemed to occur every time a decision was made that affected the educational experience of a handicapped child, a local board could be prevented from implementing changes in personnel, supportive services or even class size unless they undertook the procedural requirements of notice and hearing.

3 EHLR 551:101, 103-104.

The thrust of petitioners' argument herein seems to be that any time a handicapped child's overall experience in school is going to change, the parents or guardians are entitled to prior notice and a hearing. As is reflected in the District Court's order, the greatest change complained of by the petitioners was a reduction in extra-curricular activities available to both handicapped and non-

handicapped children. It was undisputed at trial that many of the changes complained of by parents would have occurred even if the students had not been relocated. To cite just one example, parent petitioners complained that children would no longer be recipients of the Afro-American Caravan, a program designed to provide children with added insights into courses in history and civics. This program, which is provided to both handicapped and non-handicapped students, is not intended to remain at one school but is rotated to different schools in the district. Despite this evidence, the District Court decided that the Afro-American Caravan was part of the "educational placement"

and ordered, inter alia, that respondents continue to provide the program for all petitioner students.

To interpret the EHA to require prior notice and a hearing in circumstances such as the instant case would ultimately lead to the absurd result that handicapped students would have a right to a hearing prior to the implementation of a proposed change and maintenance of the status quo pending the administrative process; non-handicapped children in the same school would have no right to review the loss of the same activities. Clearly, this could not have been the intent of Congress in enacting the legislation.

Nor can it be reasonably argued that Congress intended parents of handicapped children to be entitled to prior notice of those changes which are typically experienced by all school children when a new school term begins. There was a great deal of testimony in the District Court as to the changes in teaching personnel and the District Court decision reflected that emphasis. Yet, it is only natural that personnel changes will occur and that these changes will occur most often at the beginning of a school year. No reasonable argument can be made which would interpret these changes to be a "change" in "educational placement" as contemplated by the EHA. That the changes in

personnel were coincident with a change in the geographic location of the classes (a change specifically found by the District Court to be outside the scope of §1415(b)(1)(c)) does not automatically convert them to a "change" in educational placement."

Petitioners seem to argue that, while none of the individual changes which occurred when P.S. 79 was closed resulted in a "change" in eductional placement", taken as a whole, the differences in the children's experiences create such a change. This type of "cumulative" interpretation of the statute is possible only if both the intent and structure of the EHA is ignored. Further, such interpretation of the statute

would so hamper the effective operation of local education agencies as to make decision-making impossible. School districts would have to evaluate each variation in circumstance before the circumstances are changed to determine if those variations were so significant as to trigger the hearing provisions. Indeed, in each case the Board would have to make a separate evaluation for each child. A leave of absence of a favorite teacher may have a substantial impact on the overall experience that one child would have, while it would seem to be insignificant to another. Taken to its logical conclusion, this is exactly the result petitioners are suggesting.

After listing the numerous programs, some privately sponsored, many also available to non-handicapped students, the removal of which were found by the District Court to constitute a "change" in educational placement", the Court of Appeals stated that (App. 12a):

> [S]uch an interpretation would virtually cripple the Board's ability to implement even minor discretionary changes within the educational programs for its students .... Further, the educational agency would lack any workable standard for assessing whether a particular contemplated decision might constitute a change in "educational placement."

Underlying petitioner's argument is the presumption that all experiences a child has in the school day are part of his

"educational program". When establishing the prior notice and hearing provisions, Congress could not have intended such an amorphous standard. The events which trigger the prior notice provisions must be concrete and easily identifiable as found by the Second Circuit, otherwise each time a change in a handicapped child's educational experience is proposed, the federal courts will be required to determine if the change significantly affects the child, a decision more appropriately entrusted to the educational authorities.

Conclusion

The petition for a writ of certiorari should be denied.

December 11, 1980

Respectfully submitted,

ALLEN G. SCHWARTZ
Corporation Counsel
of the City of New York
Attorney for Respondents

LEONARD KOERNER,
JUDITH A. LEVITT,
MARION M. SCHUMAN,
CAROL ABRAMSON,
of Counsel.